Ng Terk Chai v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J–05–205 OF 2009, J–05–216 OF 2009 AND J–05–374 OF 2009
ABDUL MALIK ISHAK, APANDI ALI AND BALIA YUSOF JJCA
1 OCTOBER 2012

Criminal Procedure — Appeal — Appeal against sentence — Acquittal and discharge of charge of committing murder of child — Conviction for offence of robbery — Sentence of ten years imprisonment and three strokes of rotan each — Whether sentence should run from date of arrest — Whether remand period taken into account in sentencing — Whether sentence appropriate — Amendment of charge — Procedural errors — Whether procedural errors can be cured by s 422 of the Criminal Procedure Code — Penal Code ss 3, 302, 392 & 397

The three appellants were acquitted and discharged of the charge of committing murder of a child, an offence under s 302 of the Penal Code ('Code') read with s 34 of the same Code. However, it was found that there was sufficient evidence that all the three appellants committed robbery and they were convicted for the offence of robbery under s 392 read together with s 397 of the same Code. The three appellants were each sentenced to ten years imprisonment with effect from the date of their sentencing and each of the appellants was ordered to receive three strokes of rotan. Dissatisfied, the three appellants appealed against the sentence. The first ground of appeal was that the sentence should run from the date of arrest. It was submitted that all three appellants have served in prison for almost eight years calculated up to the date of their conviction. It was averred that the learned judge did not take into account all the three appellants' remand period when sentencing them. The second ground of appeal was that the sentence was too excessive as all the three appellants were acquitted of the murder charge and that they were convicted for robbery. Therefore, it was submitted that they should be judged within that perimeter only. Upon perusal of the appeal record, it was discovered that the learned High Court judge had amended the charge from s 302 read with s 34 of the Code to s 392 read together with s 397 of the Code but no amended charge was drafted. The amended charge was also not read and not explained to all the three appellants.

Held, setting aside the convictions and sentences of court below:

(1) Although sentencing is purely discretionary and it is the prerogative of the sentencing court to impose the appropriate sentence, it must not overlook justice and fairness. The sentencer must exercise his discretion judicially. An 'allowance' may also be given to the accused by the

sentencer (*Public Prosecutor v Iran bin Sakdon* [1998] 7 MLJ 503). The learned High Court judge had convicted all the three appellants for robbery and not for murder. Indeed the judge found that all the three appellants were not the ones who murdered the deceased. The only way to do justice and fairness would be to order the sentences of all the three appellants to run from the dates of their arrest respectively (see paras 14–15).

(2) In the interest of justice, the court set aside the convictions and sentences imposed by the learned High Court judge on the three appellants. All the three appellants have been incarcerated for almost eight years. They have been punished and they lost their liberty for that period of time (see para 52).

(3) Based on the evidence, the appropriate section of the law would be s 395 read together with ss 397 and 34 of the same Code. That would be gang robbery. The procedural errors had occasioned a failure of justice and it cannot be cured by s 422 of the Criminal Procedure Code (see para 52).

[Bahasa Malaysia summary

Ketiga-tiga perayu telah dibebaskan dan dilepaskan daripada pertuduhan melakukan pembunuhan ke atas seorang kanak-kanak, suatu kesalahan di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama-sama dengan s 34 Kanun yang sama. Walau bagaimanapun, didapati bahawa terdapat keterangan yang mencukupi bahawa ketiga-tiga perayu telah melakukan rompakan dan mereka disabitkan bagi kesalahan merompak di bawah s 392 yang dibaca bersama-sama dengan s 397 Kanun yang sama. Ketiga-tiga perayu masing-masing dijatuhkan hukuman penjara sepuluh tahun berkuat kuasa dari tarikh hukuman mereka dan ketiga-tiga perayu masing-masing diperintahkan agar dikenakan sebanyak tiga kali sebatan. Tidak berpuas hati, ketiga-tiga perayu merayu terhadap hukuman tersebut. Alasan rayuan yang pertama adalah bahawa hukuman haruslah berjalan bermula dari tarikh tangkapan. Dihujahkan bahawa ketiga-tiga perayu telah menjalankan hukuman dalam penjara selama hampir lapan tahun yang dikira sehingga tarikh sabitan mereka. Dihujahkan bahawa hakim tidak mengambil kira tempoh reman ketiga-tiga perayu dalam menjatuhkan hukuman ke atas mereka. Alasan kedua rayuan adalah bahawa hukuman tersebut adalah berlebihan kerana ketiga-tiga perayu dibebaskan daripada pertuduhan dan bahawa mereka telah disabitkan kesalahan kerana merompak. Oleh itu, dihujahkan bahawa mereka harus diadili dalam lingkungan tersebut sahaja. Setelah meneliti rekod rayuan, hakim Mahkamah Tinggi didapati telah meminda pertuduhan daripada s 302 dibaca bersama-sama dengan s 34 Kanun kepada s 392 dibaca bersama-sama dengan s 397 Kanun tetapi pertuduhan yang dipinda tidak dicatatkan. Pertuduhan

yang dipinda juga tidak dibacakan dan tidak dijelaskan kepada ketiga-tiga perayu.

Diputuskan, mengetepikan sabitan dan hukuman Mahkamah Tinggi:

(1) Walaupun menjatuhkan hukuman adalah kuasa budi bicara dan adalah menjadi prerogatif mahkamah untuk mengenakan hukuman yang sesuai, ia tidak harus mengabaikan keadilan dan kesaksamaan. Pihak yang menjatuhkan hukuman mestilah menjalankan budi bicara kehakimannya. 'Elaun' juga boleh diberikan kepada tertuduh oleh pihak yang menjatuhkan hukuman tersebut (*Public Prosecutor v Iran bin Sakdon* [1998] 7 MLJ 503). Hakim Mahkamah Tinggi telah menyabitkan ketiga-tiga perayu bagi kesalahan merompak dan bukan membunuh. Hakim telah memutuskan bahawa ketiga-tiga perayu bukan orang-orang yang telah membunuh si mati. Satu-satunya cara untuk mencapai keadilan dan kesaksamaan adalah dengan memerintahkan agar hukuman ketiga-tiga perayu berjalan dari tarikh mereka masing-masing ditangkap (lihat perenggan 14–15).

(2) Demi kepentingan keadilan, mahkamah mengetepikan sabitan dan hukuman yang dikenakan oleh hakim Mahkamah Tinggi ke atas ketiga-tiga perayu. Ketiga-tiga perayu telah dipenjarakan selama hampir lapan tahun. Mereka telah dihukum dan kehilangan kebebasan mereka untuk tempoh masa tersebut (lihat perenggan 52).

(3) Berdasarkan keterangan, peruntukan undang-undang yang sesuai adalah s 395 dibaca bersama-sama dengan ss 397 dan 34 Kanun yang sama. Ini adalah rompakan berkumpulan. Kesilapan prosedur telah menyebabkan ketidakdilan dan ia tidak boleh diperbetulkan oleh s 422 Kanun Acara Jenayah (lihat perenggan 52).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 225–235.

Cases referred to

Anwar Hussain and another v The State AIR 1952 Assam 47, HC (refd)
Bachik Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Lim Beh & Ors v Opium Farmer (1842) 3 Ky 10 (refd)
PP v Yeoh Teck Chye and Lim Hong Pung Anor v PP [1981] 2 MLJ 176, FC (refd)
Lim Yam Tek & Anor v PP [1971] 2 MLJ 17, FC (refd)
Muharam bin Anson v PP [1981] 1 MLJ 222, FC (refd)
Oh Keng Seng v PP [1974] 2 MLJ 48 (refd)
Ooi Lean Chai v PP [1991] 2 MLJ 552, SC (refd)

PP v Heng You Nang [1949] MLJ 285 (refd)
PP v Iran bin Sakdon [1998] 7 MLJ 503, HC (refd)
PP v KM Basheer Ahmad [1982] 2 MLJ 78 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Tan Eng Hock [1970] 2 MLJ 15 (refd)
PP v Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128 (refd)
R v Kenneth John Ball (1951) 35 Cr App R 164, CA (refd)
Tong Ke Kee vs PP [1941] MLJ 139 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60, 60(1)
Criminal Procedure Code ss 158, 162, 167, 173A, 282(d), 288(1), 422
Penal Code (Amendment) Act 2006
Penal Code ss 34, 302, 392, 395, 397

Appeal from: Criminal Trial No 45–61 of 2002 (High Court, Johor Bharu)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellants.
Tetralina Ahmed Fauzi (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] On 21 August 2009, the Johor Bahru High Court acquitted and discharged all the three appellants herein, namely:

(a) Muthu a/l M Vellu ('the first appellant');

(b) Ng Terk Chai ('the second appellant'); and

(c) Goh Wee Kok ('the third appellant'),

of the charge of committing murder of a female Indian child by the name of Maniarasi a/p Santhira Segaran (Birth Certificate No 947785) under s 302 of the Penal Code read with s 34 of the same Code.

[2] After calling the defence of all the three appellants for the charge of committing murder of the said child under s 302 of the Penal Code read with s 34 of the same Code and after having heard their defence, His Lordship acquitted and discharged them accordingly. But His Lordship found that there was sufficient evidence that all the three appellants committed robbery and His Lordship proceeded to convict them for the offence of robbery under s 392 of the Penal Code read together with s 397 of the same Code. His Lordship then

sentenced each of the appellants to ten years imprisonment with effect from the date of sentence (21 August 2009) and each of the appellants was ordered to receive three strokes of the rattan.

[3] Aggrieved, all the three appellants now appeal against the sentence.

[4] The public prosecutor appealed against the three appellants' acquittals in respect of the murder charge under s 302 of the Penal Code read with s 34 of the same Code.

ARGUMENTS OF THE APPELLANTS ON SENTENCING

[5] Mr Hisyam Teh Poh Teik, learned counsel for all the three appellants, submitted on the sentence imposed by the Johor Bahru High Court. He focussed on the two main grounds:

(a) that the sentence should run from the date of arrest of all the three appellants; and

(b) that the sentence is too excessive.

THE FIRST GROUND

[6] It was argued that the sentence should run from the date of arrest and not from the date of conviction.

[7] The date of conviction was on 21 August 2009 as reflected at p 96 of the appeal record.

[8] Both the first appellant and the third appellant were arrested on 23 October 2001 whereas the second appellant was arrested on 24 October 2001. All these are mentioned by the learned High Court judge in his written grounds of judgment at p 103 of the appeal record.

[9] All the three appellants have been incarcerated for almost eight years calculated up to the date of their conviction on 21 August 2009. To be precise, for the first appellant, it was seven years nine months and 28 days calculated from 23 October 2001 to 21 August 2009. For the second appellant, it was seven years nine months and 27 days calculated from 24 October 2001 to 21 August 2009. The third appellant was incarcerated just like the first appellant and it was for seven years nine months and 28 days.

[10] The date of the offence as reflected in the charge was on 17 August 2001. A

[11] The offence under s 392 of the Penal Code is one of robbery which carries a maximum sentence often ten years imprisonment and this is the position of the quantum of imprisonment prior to its amendment on 7 September 2007 by virtue of the Penal Code (Amendment) Act 2006 (Act A1273). Meanwhile, the offence of robbery when, 'armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person', under s 397 of the Penal Code then, 'such offender shall be liable to be whipped, in addition to any other punishment to which he may be liable under any other section of this Code'. B C

[12] And by virtue of s 288(1) of the Criminal Procedure Code ('CPC'), the whipping shall not exceed 24 strokes in the case of an adult. Here, each of the appellants received only three strokes of the rattan. D

[13] Here, the learned High Court judge imposed the maximum sentence of ten years imprisonment from the date of conviction which was on 21 August 2009 'because of the heinous crime that resulted in the death of the deceased' (see p 110 of the appeal record). It is obvious that His Lordship did not take into account all the three appellants' remand period when sentencing them. It is trite that the period of remand of the prisoner should be taken into account when the trial court imposes the custodial sentence. In *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222, Seah acting CJ (Borneo) speaking for the then Federal Court had this to say at pp 224–225 of the report: E F

> We turn now to consider the appeal against the sentence of six years' imprisonment. In sentencing the appellant, the learned trial judge said: 'Sentence to run from date of his detention on 29.11.1978'. G
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> Counsel for the appellant had argued that the sentence was unduly harsh having regard to the circumstances of the case. For the Public Prosecutor it was submitted that the sentence should not be disturbed.
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> At the appeal it transpired that the appellant was first arrested on September 28, 1977 when he was remanded till released on court bail on January 11,1978. However, after the conclusion of the preliminary inquiry when the appellant was committed for trial in the High Court it seems that his bail was revoked and he was remanded in custody on November 29,1978 till his trial. The learned trial judge was misled into thinking that he was under detention since that date when the appellant said that he was kept in prison since November 29, 1978. When the learned trial judge imposed the sentence of six years' imprisonment to take effect from November 29, 1978 he did not appear to know that the appellant had already been remanded for about three and half months from September 28, 1977 to January 11, 1978. In our view this period of detention, brief though it may appear, ought to have been taken into account by the learned trial judge for the purpose of passing H I

sentence. Apart from this we are of the view that the learned trial judge had taken into consideration all the relevant factors. Accordingly, we would reduce the sentence from six to five years' imprisonment to take effect from November 29, 1978.

[14] It is acknowledged that sentencing is purely discretionary and it is the prerogative of the sentencing court to impose the appropriate sentence. But whatever sentence the sentencing court imposes, it must not overlook justice and fairness. And the sentencer must exercise his discretion judicially. An 'allowance' may also be given to the accused by the sentencer. The late Augustine Paul J (later FCJ) in *Public Prosecutor v Iran bin Sakdon* [1998] 7 MLJ 503 aptly said at p 510 of the report:

> A court may also make some allowance in imposing sentence where the accused has spent a long time in custody while awaiting trial (see *R v Layton* [1959] Crim LR 61; *R v Newman* [1959] Crim LR 138; *R v Yakimovitch* [1960] Crim LR 66.

[15] The learned High Court judge convicted all the three appellants for robbery and not for murder. Indeed His Lordship found that all the three appellants were not the ones who murdered the deceased. The only way to do justice and fairness would be to order the sentences of all the three appellants to run from the dates of their arrest respectively — so submitted Mr Hisyam Teh Poh Teik.

THE SECOND GROUND

[16] It was argued that the sentences imposed on each of the three appellants are too excessive bearing in mind that:

(a) all the three appellants were acquitted of the murder charge; and

(b) all the three appellants were convicted for robbery and they should be judged within that perimeter only.

THE PROSECUTION'S ARGUMENTS ON SENTENCING

[17] The learned deputy public prosecutor in the person of Madam Tetralina Ahmed Fauzi argued that the sentences imposed on each of the three appellants ought not to be disturbed since it involved the judicial discretion of the learned High Court judge. She correctly cited and relied on the decision of the Federal Court in the case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1

MLJ 83 (FC). There Raja Azlan Shah, acting Lord President (as His Majesty then was) aptly said at p 84 of the report:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the execise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.

[18] She further submitted the sentence imposed was not 'grossly excessive' and it was within the provisions of the law. She then made reference to the written grounds of judgment of the learned High Court judge at p 110 of the appeal record where His Lordship said:

> The sentence of imprisonment is to commence from date of conviction because of the heinous crime that resulted in the death of an innocent child and merits the full sanction of the law to be imposed on all the 3 accused. Public interest far outweighs the mitigating plea of all three accused which warrants the sentence of imprisonment to commence from the date of conviction as provided for under Section 282(d) of the Criminal Procedure Code.

[19] She argued that public interests far outweighed the interests of the appellants and she cited the decision of Hashim Yeop A Sani J (later the Chief Justice) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, at pp 257–258, where His Lordship said:

> Presidents and magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as

possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v Grondkowski* [1946] 1 All ER 560, 561 offered some good advice when he said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

[20] She emphasised the seriousness of the charge against all the three appellants notwithstanding the convictions entered against them was for robbery by the learned High Court judge. She cited the case of *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128 to drive home the point that this court should take into account the seriousness of the charge. In *Tengku Mahmood Iskandar's* case, Raja Azlan Shah J (as His Majesty then was) aptly said at p 129 of the report:

> It is well settled that the sentence must reflect the gravity of the offence. In the present case it is not so much the triviality of the injury but the circumstances culminating in the commission of the offence which are of importance.

[21] Justice Hilbery J in *R v Kenneth John Ball* (1951) 35 Cr App R 164 wrote a classic judgment on sentencing that has stood the test of time. At p 166, His Lordship said:

> Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

[22] Continuing on the same page, Justice Hilbery said:

> It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform it leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career. The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force. The differentiation in treatment is justified if the

court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences.

[23] In regard to the sentence of imprisonment which took effect from the date on which it was passed — from the date of conviction on 21 August 2009, the learned deputy referred to s 282(d) of the CPC which enacts as follows:

(d) every sentence of imprisonment shall take effect from the date on which it was passed unless the Court passing the sentence otherwise directs.

[24] Augustine Paul JCA in *Bachik Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004] 2 CLJ 572, writing for this court rightly said at p 540 (MLJ); p 579 (CLJ):

The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case.

[25] According to the learned deputy, the facts and circumstances of the present appeal warranted the sentence of imprisonment to take effect from the date of conviction which was on 21 August 2009.

THE PROSECUTION'S APPEAL AGAINST ACQUITTAL AND DISCHARGE OF THE THREE RESPONDENTS OF THE MURDER CHARGE UNDER S 302 OF THE PENAL CODE READ WITH S 34 OF THE SAME CODE

[26] Under this head, the first appellant will be referred to as the 'first respondent' while the second appellant will be referred to as the 'second respondent' and the third appellant will be referred to as the 'third respondent'. It is ideal, at this juncture, to narrate the brief facts of the case.

[27] The deceased was one Maniarasi a/p Santhira Segaran. The deceased's mother is one Lily a/p M Chelliah ('SP8'). SP8 ran a sundry shop at her house at Number 17, Jalan Cempaka, Taman Air Bemban, Kulai. On 17 August 2001 at about 1.30pm, while SP8 was at home three men (later identified as the three respondents) came in a motorcar. One of them (later identified as the second respondent) asked for a packet of cigarettes. When SP8 handed over the cigarrettes, the second respondent pointed a knife at her and asked for money. When the deceased, who was next to SP8 at the material time, started screaming, the second respondent told something to the third respondent who then covered the deceased's mouth and took her away in the motorcar. The

deceased's body was later found at the Kolam Air PUB, at Batu 19 Jalan Baru/Pontian at about 5.30pm on 18 August 2001.

[28] The respondents' defence may be stated as follows. The respondents' defence was that they approached SP8's shop with the sole intention of robbing it. They panicked when the deceased started screaming. They had no choice but to grab her and took her inside the motorcar and fled. They left the deceased at a petrol station at Taman Sri Pulai, Johor Bahru. Before they left her there, they gave her RM70.

[29] At the end of the defence case, the learned High Court judge found that the defence had successfully raised a reasonable doubt on the prosecution's case and His Lordship convicted them for robbery under s 392 of the Penal Code read together with s 397 of the same Code.

[30] It was argued that the learned High Court judge was correct in amending the charge and convicting the three respondents for the offence of robbery. It was submitted that the circumstantial evidence was not strong enough to convict the three respondents for the charge of murder.

[31] It was further argued that the three respondents realised the magnitude of the offence which they committed and they released the deceased at the Taman Sri Pulai bus stand and gave the deceased the sum of RM70. And the learned High Court judge accepted the defence of the three respondents.

THE CONVICTION AND SENTENCE UNDER S 392 OF THE PENAL CODE READ WITH S 397 OF THE PENAL CODE

[32] We have perused through the appeal record with a fine toothcomb. We found that during the session on 21 August 2009 as reflected at p 96 of the appeal record, the learned High Court judge gave his decision at the close of the defence case after considering the submissions of the parties on both sides. His Lordship's decision can be seen at p 97 of the appeal record and it was worded as follows:

> Mahkamah: The defence has created a reasonable doubt as to the charge of murder in P2 at the close of the defence case and all three accused is hereby acquitted and discharged from the charge of murder under Section 302 of the Penal Code.
>
> However upon a maximum evaluation of the evidence of the prosecution's witness and the defence witness I find that the offence of robbery under Section 392 of the Penal Code has been established beyond reasonable doubt by the prosecution and all three accused is hereby convicted for the offence of robbery under Section 392 read together with Section 397 of the Penal Code.

[33] The written grounds of judgment of the learned High Court judge can be seen at p 109 of the appeal record and it was worded in this way:

> Upon evaluating the evidence adduced by both the prosecution and the defence it is my considered view that a doubt has been created by the defence on the charge of murder. The circumstantial evidence taken together with the evidence in the defence of all three accused gives rise to a doubt as to their culpability in the death of the deceased. The post mortem report states that the cause of death was strangulation but regretfully no DNA tests were conducted to link the strangulation on the neck with all the accused.
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> However there is sufficient evidence that all 3 accused committed robbery. This is clearly discernible from the evidence of SP8 and the clear admission by all the three accused in their defence and I accordingly hold that the prosecution has established beyond reasonable doubt the offence of robbery under Section 392. The defence of all the 3 accused failed to create any reasonable doubt on the robbery charge. All three accused is accordingly convicted for the offence of robbery under Section 392 read together with Section 397 of the Penal Code.
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> I accordingly sentenced all three accused to a term of 10 years imprisonment commencing from the date of conviction and three strokes of the rottan. All 3 accused is acquitted and discharged for the offence of murder under Section 302 of the Penal Code.

[34] In the midst of hearing the submissions of the parties in open court, we interrupted and made the following observations:

> The appeal record do not reflect that the learned High Court judge had amended the charge to s 392 of the Penal Code to be read with s 397 of the Penal Code. Even the learned deputy public prosecutor cannot show us the amended charge drafted by the learned High Court judge. That amended charge should be read and explained to all the three respondents and their pleas to be taken and they be given the option of recalling witnesses. Are the procedural defects curable under s 422 of the CPC? The respondents merely appealed against the sentences imposed and not against their convictions under the amended charge. So, can this court set aside the convictions? No one seems to be aware of these impediments. We allow time to both the learned deputy public prosecutor and the learned defence counsel to consider these points and respond to us. We adjourn this court for 30 minutes.

[35] 30 minutes later, we mounted the bench. At the resumed hearing, the learned deputy public prosecutor drew our attention to the relevant provisions of the CPC. She cited s 162 of the CPC which reads as follows:

> Recall of witnesses when charge altered
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> 162. Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

[36] She also cited s 167 of the CPC which reads as follows:

> When a person charged with one offence can be convicted of another
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> 167. If in the case mentioned in section 166 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

[37] Learned defence counsel for all the three respondents rightly cited s 158 of the CPC. That s 158 reads as follows:

> Court may alter or add to charge
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> 158.
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> (1) Any Court may alter or add to any charge at any time before judgment is pronounced.
>
> (2) Every such alteration or addition shall be read and explained to the accused.

[38] Using s 158 of the CPC as a leverage, learned defence counsel urged us to set aside the convictions and sentences against all the three respondents for the amended charge of robbery and set them free. Learned defence counsel took advantage of what we have observed earlier and he submitted that the procedural defects were not curable under s 422 of the CPC.

[39] Now, s 158 of the CPC vests ample power to the court to alter or amend a charge, at any time before judgment is pronounced. Once a charge is altered or amended, it must be read and explained to the accused (see *Public Prosecutor v Heng You Nang* [1949] MLJ 285; and *Oh Keng Seng v Public Prosecutor* [1974] 2 MLJ 48).

[40] Once a charge is altered or amended by the trial court, the prosecution and the accused shall be allowed to recall or resummon and examine any witness in the context of the altered charge or amended charge and the trial court too may also call any further witness whom it may think to be material. It has been stated by the case of *Anwar Hussain and another v The State* AIR 1952 Assam 47 that the denial of the right to recall or re-examine any witness vitiates the trial and is not curable.

[41] It is appropriate to say that s 60 of the Courts of Judicature Act 1964 gives a wide power to the Court of Appeal to set aside the convictions and sentences passed by the learned High Court judge for the amended charge of robbery notwithstanding that all the three respondents merely appealed against their sentences and not against their convictions under the amended charge.

[42] In all its splendour, s 60 of the Courts of Judicature Act 1964 is worded as follows:

> Powers of Court of Appeal
>
> 60.
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> (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
>
> (2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.
>
> (3) The Court of Appeal shall in no case make any order under this section as to payment of costs of any appeal to or by the appellant or respondent.

[43] The powers of the Court of Appeal in criminal trials are set out in s 60(1) of the Courts of Judicature Act 1964 to 'confirm, reverse or vary the decision of the High Court or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised' (*Lim Yam Tek & Anor v Public Prosecutor* [1971] 2 MLJ 17 (FC); and *Ooi Lean Chai v Public Prosecutor* [1991] 2 MLJ 552 (SC).

[44] The appellate court can also convict an accused on the amended charges based on the evidence available on record (*Public Prosecutor v Yeoh Teck Chye* and *Public Prosecutor v Yeoh Teck Chye and Lim Hong Pung Anor v Public Prosecutor* [1981] 2 MLJ 176 (FC).

[45] In regard to s 422 of the CPC, it is now reproduced verbatim:

> Irregularities not to vitiate proceedings

A 422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;

B

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

C unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[46] It is said that s 422 of the CPC is couched in wide terms. It throws the D net wider. It cures all forms of irregularities, error, omission or improper admission or rejection of evidence unless it has occasioned a failure of justice. Matters which are illegalities and not irregularities cannot be cured under this provision (*Tong Ke Kee vs Public Prosecutor* [1941] MLJ 139).

E **[47]** It was held in *Public Prosecutor v Tan Eng Hock* [1970] 2 MLJ 15 that an order of binding over under s 173A of the CPC after recording a conviction was an illegality and the defect cannot be cured by s 422 of the CPC.

F **[48]** It was held in *Public Prosecutor v KM Basheer Ahmad* [1982] 2 MLJ 78 that the prosecution of the accused by way of a private prosecution on the basis that the offence was a non-seizable offence, was illegal because the law has been amended to make the offence seizable. Such an illegality cannot be cured by s 422 of the CPC.

G **[49]** Here, we are concerned with the amended charge under s 392 of the Penal Code read together with s 397 of the Penal Code which cannot be found in the appeal record. Here too, the amended charge was not read and explained to the three respondents and they were also not given the option to recall H witnesses.

[50] It is trite that the charge in criminal proceedings defines the issues pertaining to the offence which the accused is alleged to have committed and I that charge sets out the circumstances of the crime. The importance of a charge cannot be denied. The charge must be drafted clearly and sufficiently precise to enable the accused to know exactly what he is being accused of so that he may be able to answer the charge levied against him. In *Lim Beh & Ors v Opium Farmer* (1842) 3 Ky 10 at p 12, Norris R had this to say about the charge:

> It is almost needless to say that the defendants were not legally bound to answer a charge so vague and undefined; for, if there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as he best may.

[51] We are grateful to the learned deputy public prosecutor who magnanimously agreed that the procedural defects cannot be cured by s 422 of the CPC.

[52] In an open court, we delivered our unanimous decision, as follows:

> We have perused through the appeal record and we found that the learned High Court judge breached ss 158 and 162 of the CPC. The charge was amended by the learned High Court judge from s 302 of the Penal Code read with s 34 of the same Code to s 392 of the Penal Code read together with s 397 of the Penal Code (see pp 97 and 109 of the appeal record). Yet His Lordship failed to draft an amended charge and have that amended charge read and explained to all the three respondents/accused persons. In fact, the appeal record does not show the existence of any amended charge prepared by the learned High Court judge. In our judgment, based on the evidence, the appropriate section of the law would be s 395 of the Penal Code read together with s 397 of the Penal Code and s 34 of the same Code. That would be gang robbery.
>
> We take note that all the three respondents merely appealed against the sentences imposed by the learned High Court judge and there were no appeals by them against their convictions under ss 392/397 of the Penal Code.
>
> In our judgment, the procedural errors as highlighted by us 'has occasioned a failure of justice' and it cannot be cured by s 422 of the CPC. And this has been so conceded by the learned deputy public prosecutor.
>
> In the interest of justice, we have no choice but to set aside the convictions and sentences imposed by the learned High Court judge on the three respondents. We set them free.
>
> Incidentally, it must be borne in mind that all the three respondents have been incarcerated since 23 October 2001 (for the first respondent), 24 October 2001 (for the second respondent) and 23 October 2001 (for the third respondent). They have been punished and they lost their liberty for that period of time.

[53] We are grateful to the parties on both sides for assisting us in arriving at our decision.

Convictions and sentences of court below set aside.

Reported by Afiq Mohamad Noor